

BASIN-WIDE ISSUE 5
(CONJUNCTIVE MANAGEMENT GENERAL PROVISIONS)

In Re SRBA
Twin Falls County Civil Case No. 39576
Sub-Case No. 91-00005

1999 Supplemental Director's Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources
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INTRODUCTION

The Director of the Idaho Department of Water Resources (IDWR) submits this Supplemental Director's Report regarding Basin-Wide Issue 5 (Conjunctive Management General Provisions), in response to the "Amended Order Setting Deadline for IDWR to File Direct Testimony and Setting Initial Hearing on Basin-Wide Issue 5 on Remand - Conjunctive Management Snake River Basin-Wide" issued by the SRBA District Court on December 17, 1999. This report is the direct testimony of Karl J. Dreher in this matter.

The SRBA District Court has required that the following four issues be addressed in this report:

- I. A precise definition of conjunctive management;
- II. The basis for IDWR's generic recommendation for general provisions addressing conjunctive management;
- III. The interplay between the sub-basin specific language and the general interconnection language; and
- IV. An explanation of how the proposed general provisions are tailored to provide specific exceptions for each sub-basin within the overall Snake River Basin.

This report responds to the four issues above. During recent years, IDWR has conducted extensive studies to develop conjunctive management, alternatively termed conjunctive administration, for the Snake River Basin including the application of computer modeling techniques to develop estimates of the effects of ground water withdrawals on ground water levels and surface water sources. These studies and the

procedures for applying conjunctive management are beyond the scope of this report, but will be addressed in future reports to the SRBA District Court as needed and upon request by the Court.

This report has been developed within the context of existing documents, which have been identified in the attached list of references. It incorporates portions of a report on the same topic issued by IDWR on March 11, 1996. While this present report expands on the issues and incorporates significant actions since the 1996 report was prepared, the basic premises of the 1996 report remain unchanged.

I. WHAT IS THE DEFINITION OF CONJUNCTIVE MANAGEMENT?

This term is defined in the Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37, Title 03, Chapter 11. Conjunctive management is defined in these rules as the “Legal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water resources, including areas having a common ground water supply.” In practical terms, conjunctive management is the combined administration of water rights from "hydraulically connected" surface and ground water sources recognizing the relative priorities of the rights, the physical characteristics and significance of source connectedness, and the differences in impacts occurring from surface water diversions versus impacts from ground water diversions. "Hydraulically connected" surface water and ground water sources simply means that within these sources, a portion of the surface water can become ground water or vice versa. These definitions provide for distributing water to rights from connected surface and ground water sources in accordance with the prior appropriation doctrine while recognizing the delayed and distributed effects of ground water diversions on hydraulically connected surface water sources.

The combined administration of water rights from connected surface water tributaries in the Snake River Basin (i.e., surface water tributaries flowing into other surface water tributaries or into the mainstem of the Snake River) is comparable to the combined administration of water rights from hydraulically connected surface and ground water sources. Consequently, IDWR has included recommendations for the administration of connected surface water tributaries as part of the general provisions recommended for conjunctive management of hydraulically connected surface and ground water resources. Additionally, the Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37, Title 03, Chapter 11, include provisions recognizing that the holder of a ground water right may make a delivery call against holders of more junior ground water rights.

II. WHAT IS THE BASIS FOR IDWR'S GENERIC RECOMMENDATION FOR GENERAL PROVISIONS ADDRESSING CONJUNCTIVE MANAGEMENT?

a. Background

Idaho Code § 42-1412(6) provides in part that, "The decree shall also contain an express statement that the partial decree is subject to such general provisions necessary for the definition of the rights, or for the efficient administration of the water rights." The Idaho Supreme Court explained the application of this statute in the court decree :

[A] general provision should be included in a water right decree if such general provision is 'necessary' to define or efficiently administer water rights. Whether a general provision is 'necessary' depends upon the specific general provision at issue and involves a question of fact, (defining the proposed general provision and the circumstances of its application), and a question of law, (determining whether the general provision facilitates the definition or efficient administration of water rights in a decree). A general provision is 'necessary' if it is required to define the water right being decreed or to efficiently administer water rights in a water right decree.

A & B Irrigation District v. Idaho Conservation League, 131 Idaho 411,958 P.2d 568 (1998).

The fundamental issue regarding general provisions for conjunctive management is the extent to which decrees in the SRBA will define conjunctive management, or conjunctive administration, of water rights. The answer necessarily involves determining what is appropriate within a spectrum of alternatives. At one end of the spectrum, the decree could exclude any provisions for conjunctive management. Such a determination could be viewed as insulating holders of junior ground water rights from calls by holders of senior surface water rights, essentially decreeing that the surface and ground water sources are separate for purposes of administration. At the other end of the spectrum, the decree could determine the relationship of each water right in the Snake River Basin to each other water right in the basin. Thus, if a senior appropriator on the Snake River were not receiving water, the decree would determine which junior appropriators would be subject to curtailment on each surface water tributary of the Snake River, each ground water source hydraulically connected to the Snake River, and each ground water source hydraulically connected to each surface water tributary to the Snake River. However, it is presently not possible to accurately make determinations precisely quantifying the relationships between all water rights under all conditions, at least between some hydraulically connected surface and ground water sources, because hydrologic and geologic data are not available for all present and future conditions.

Resolving this fundamental issue requires recognition of the reality that administration of water rights -- the distribution of water in accordance with priority in times of shortage -- is a complex process. It is generally recognized that both water demand and water supply are constantly changing. Irrigators, for example, may divert water only at certain times depending on crops, weather, rotation practices, or other factors that substantially affect the quantity of water demanded at any given time. Stream flows are the most notable example of fluctuating supply as flows are subject to change annually, within the annual water cycle, or even within a single day,

depending on weather conditions. Additionally, conjunctive management depends on detailed data. Unfortunately, adequate data are not always available, and both data and technologies to collect and use needed data are evolving and improving. To further complicate the issue, changes can occur such as changes in geotechnical properties resulting from seismic activity. Ground water modeling and computerized water accounting are two techniques that rely on these data for the administration of water rights, and improvements to both are ongoing in the Snake River Basin.

To develop its previous recommendations for appropriate conjunctive management general provisions, as set forth in the Director's Report dated March 11, 1996, IDWR considered the following factors.

1 . The significance of the hydraulic connection. There likely is some hydraulic connection between all sources of water within the Snake River Basin, since they are all part of the same basin. However, to warrant conjunctive management, the connection must be of sufficient significance to raise the potential for injury.¹ "Significant connection" is, therefore, a threshold criterion in determining whether provisions for conjunctive management are appropriate.

2. The potential for controversy. Absent the potential for controversy about whether conjunctive management is necessary to ensure that water rights are protected, debates about conjunctive management are theoretical. "Potential for controversy" is therefore another threshold criterion in determining whether provisions for conjunctive management are necessary.

¹ *Beecher v. Cassia Creek Irrig. Co.*, 66 Idaho 1, 154 P.2d 507 (1944).

With respect to Basins 34 and 36, these criteria were clearly met. The existence of both a significant connection and the potential for controversy have been demonstrated by the proceedings in the *Musser*² case in Basin 36, and by the proceedings on interim administration in Basin 34. Therefore, IDWR included recommendations for conjunctive management general provisions for each basin. With respect to Basin 57, IDWR originally concluded in 1995 that these criteria were not met, and included explanatory material in the 1995 Director's Report that summarized the information currently available about the nature of the connection between sources. After collecting additional data and performing further analysis, IDWR has more recently concluded that there are sufficient connections to warrant recommendations for conjunctive management general provisions in Basin 57.

b. Rationale for generic recommendation versus detailed administrative provisions

There is a distinction between decreeing that sources are to be conjunctively managed and decreeing administrative details as to how they are to be conjunctively managed. The distinction is best explained in the report of the 1994 Interim Legislative Committee on the Snake River Basin Adjudication. In item VIII (E), commencing on page 36 of the report, the Committee states as follows:

Conjunctive management of ground and surface water rights is one of the main reasons for the commencement of the Snake River Basin Adjudication. In fact, the Snake River Basin Adjudication was filed in 1987 pursuant to I.C. §42-1406a, in large part to resolve the legal relationship between the rights of the ground water pumpers on the Snake River Plain and the rights of Idaho Power at its Swan Falls Dam. *Idaho Power Co. v. State*, 104 Idaho 575, 588 (1983); *In re Snake River Basin Water System*, 115 Idaho 1, 2-3 (1988). The SRBA must proceed in a fashion that advances wise conjunctive management of our ground and surface water.

² *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

Historically, conjunctive management has not occurred in Idaho, especially between the Snake River Plain Aquifer and the Snake River. To conjunctively manage these water sources a good understanding of both the hydraulic relationship and legal relationship between ground and surface water rights is necessary.

Although these issues may need to be resolved by general administrative provisions in the adjudication decrees, they generally relate to two classic elements of a water right — its source and priority. The SRBA should determine the ultimate source of the ground and surface water rights being adjudicated. This legal determination must be made in the SRBA. The IDWR should provide recommendations to the SRBA District Court on how it should do so. Further, the SRBA District Court must determine the relative priority between surface and ground water rights.

If the SRBA proceeds and these issues are not addressed, a major objective for the adjudication will not have been served. Conjunctive management will be set back and another generation of ground and surface water users will be uncertain regarding their relationship to each other.

In this analysis, the Committee described its understanding of the role of the SRBA relative to conjunctive management to be two-fold. First, the SRBA “should determine the ultimate source of the ground and surface water rights being adjudicated.” Second, the SRBA District Court “must determine the relative priority between surface and ground water rights.” These determinations effectively anticipate a decree whereby sources are to be conjunctively managed. However, there is no implication that the procedures or mechanics of conjunctive management are to be determined or decreed in the SRBA.

The Idaho Supreme Court also highlighted the distinction between decreeing whether sources are to be conjunctively managed and how they are to be conjunctively managed. In *A & B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1998) the Court stated the following:

Here of course, the Director's proposed conjunctive management provisions were designed to address within the SRBA the ground water and surface water interconnections and impacts relating to three specific Basins. The general provisions proposed for each of the Basins were not identical, but were distinctively crafted evidently due to the unique characteristics of each of the individual reporting areas.

We conclude that the order of the district court denying the inclusion of general provisions dealing with interconnection and conjunctive management of surface and ground water rights in Basin 34, 36 and 57 must be vacated and the matter remanded to the district court for the purpose of holding an evidentiary hearing to determine factually whether the proposed general provisions for each of those areas is necessary either to define or to efficiently administer the water rights decreed by the court in the adjudication process. Because each of the proposed general provisions regarding interconnection and conjunctive management in Basins 34, 36 and 57 is separate and distinct, each Basin's conjunctive management provisions must be discretely considered in reaching the factual determination whether the respective general provisions are necessary either to define or to more efficiently administer water rights in that particular Basin.

We remand this proceeding to the SRBA district court for the purpose of holding an evidentiary hearing to determine whether the conjunctive management general provisions proposed for Basins 34, 36 and 57 are necessary to define or to administer water rights efficiently in any of those particular Basins.

A & B Irrigation District, 131 Idaho at 425.

With these instructions, the Idaho Supreme Court simply calls for a determination of whether conjunctive management general provisions are necessary to define or to administer water rights efficiently in specific basins. There is no indication from the Court that the procedures or mechanics of conjunctive management are to be determined by the SRBA Court.

c. Importance of general provisions to define and efficiently administer water rights

As stated by the 1994 Interim Legislative Committee, the ultimate source of the ground and surface water should be adjudicated. If the SRBA determines that water rights are diverted from connected sources, this provides a starting point for subsequent administration of water rights within the Snake River Basin. Thus, general provisions for conjunctive management help to define the water rights by establishing the relationship or connectedness between water rights from one source and water rights from other connected sources within the Snake River Basin.

Connected sources should be managed in a combined manner, or conjunctively. The SRBA serves to bring into perspective, and into combined administration, tributaries to the Snake River, including ground water, so that future water distribution in tributaries will be appropriately conducted with respect to other water rights within the Snake River Basin.

In evaluating whether the general provisions recommended by IDWR are appropriate, the effect, or lack thereof, that these general provisions will have on the future administration of water rights must be considered. The principal effect of these general provisions is to establish that junior ground water appropriations subject to such provisions have the potential to injure senior surface appropriations in the Snake River Basin. However, the recommended general provisions do not provide that hydraulically connected sources are to be decreed as a single source. To do so would imply curtailment of junior ground water appropriators in most years no matter how insignificant the connection between sources or whether injury occurs. Neither do the recommended general provisions imply that hydraulically connected sources are totally independent. To do so would imply that there is no potential for injury to senior surface water rights if junior ground water appropriators are diverting from hydraulically connected sources. Instead, quantifying the effects of the connections and determining injury would be deferred until fact-specific determinations are ripe for administrative proceedings tailored to resolve specific conflicts and related issues.

Efficient administration of water rights is enhanced via recognition that water distribution in tributaries is to be done considering and in combination with the distribution of other water rights from connected sources throughout the Snake River Basin. However, in some sub-basins, a court has previously decreed separate administration in a general adjudication. In such sub-basins, the results of prior general adjudications should be respected.

d. Basis for pending general provision recommendations

In 1995, a high priority initiative for Governor Batt was to advance progress on the SRBA. Accordingly, IDWR prepared amended recommendations for general provisions for the test basins. These amended recommendations were submitted to the SRBA District Court in December, 1995. In 1998, after the Supreme Court issued its decision on Basin-Wide Issue 5, IDWR held a meeting with interested parties on June 10, 1998, in Burley, Idaho. The meeting was held to discuss options for conjunctive management provisions which would take into account guidance provided by the Supreme Court in its decision and would be acceptable to holders of water rights for surface and ground water as well as IDWR. Information from the meeting was summarized and distributed, and a follow-up meeting was held on June 24, 1998 in Twin Falls, Idaho. At this second meeting, one option was developed that seemed to best satisfy the concerns of the participants. Based on this option, IDWR developed the three-paragraph form for conjunctive management general provisions that has been used since that time. (See Table No. 1)

The general provisions establish which sources are to be administered conjunctively. The provisions do not specify how conjunctive management is to occur, nor is such specification necessary. The procedures for applying conjunctive management will be a function of available information and specific issues within a particular basin. To the extent that general provisions link sources to other connected sources within the administrative sub-basin and within the encompassing Snake River

Basin, these provisions help to define and provide for efficient administration of the water rights that will be decreed in the SRBA.

e. Supplemental Director's Reports

The SRBA District Court ordered IDWR to file Supplemental Director's Reports with recommendations of specific dates for the beginning and ending of the irrigation season and for conjunctive management. *Order Requesting Supplemental Director's Report from Idaho Department of Water Resources for Irrigation Season and Conjunctive Management General Provisions in Reporting Areas 1, 2 and 3* (Dec. 9, 1998). The SRBA Court set the due date for the Supplemental Director's Reports as previously ordered by Judge Hurlbutt. *Amended Order Requesting Supplemental Director's Reports from Idaho Department of Water Resources for Irrigation Season and Conjunctive Management General Provisions in Reporting Areas 1, 2 and 3* (May 5, 1999). On June 24, 1999, IDWR filed its Supplemental Director's Report, Reporting Area 1, IDWR Basin 34, Regarding Revision of the Following: Period of Use (for Irrigation Water Uses), Conjunctive Management General Provisions (Supplemental Director's Report). This report set forth specific recommended dates for the irrigation season, included recommended general provisions for conjunctive management, and established the deadline for Objections as July 30, 1999. On July 26, 1999, IDWR filed a similar report for Basin 57, establishing the deadline for Objections as September 3, 1999. On August 2, 1999, IDWR filed another similar report for Basin 36, with the deadline for Objections established as September 10, 1999.

III. WHAT IS THE INTERPLAY BETWEEN THE SUB-BASIN SPECIFIC LANGUAGE AND THE GENERAL INTERCONNECTION LANGUAGE?

a. General provision considerations

The conjunctive management provisions IDWR believes to be necessary for both the definition of water rights and to more efficiently administer water rights are described in Table No. 1, attached hereto. For each basin, these provisions are recommended in a three-paragraph form. The first paragraph provides for identifying sources from which water rights are recommended to be distributed as if the identified sources are unconnected to other sources within that particular basin. The second paragraph provides for identifying sources from which water rights are recommended to be distributed as if the identified sources are unconnected to other sources within the entire Snake River Basin.

The third paragraph of the general provisions states “All water rights in Basin ___ are from connected sources of water in the Snake River Basin and shall be administered conjunctively.” The third paragraph provides that unless otherwise identified in the first two paragraphs of the provisions, all water rights in the specified basin are to be distributed considering the sources of water to be sources within the Snake River Basin and shall be administered conjunctively. This paragraph is consistent with the statement of the Idaho Supreme Court:

Furthermore, and as recognized by the district court, it is not in contest in the SRBA proceedings that most, if not all, water in the Snake River system is interconnected. The court observed that general interconnection of all water in the Snake River system is well settled, and that 'all water under jurisdiction of the SRBA Court is interconnected, unless the party claiming otherwise proves by a preponderance of the evidence that the water is from a separate source.'

A & B Irrigation District, 131 Idaho at 421-422.

While the Idaho Supreme Court recognized that “most, if not all” of the water in the Snake River system is interconnected, this statement does not apply specifically to any water right. One could argue that a specific source is not connected. The purpose of the third paragraph in the general provisions is to provide that all water rights in a specified basin are found to be from connected sources, based on available information, unless explicitly excepted by the first two paragraphs. This constitutes a

message to the claimant or water right holder that this is the time to provide any information which would dispute the assessment of connectedness. Inclusion of this language in the general provisions provides guidance to all interested parties and to IDWR that the water rights in the basin are to be administered conjunctively unless otherwise specifically provided.

b. Role of Conjunctive Management Rules

IDWR's existing Conjunctive Management rules set forth procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a connected or common ground water supply. The rules provide that if a delivery call is made, the Director will consider all available data and information at the time the delivery call is made quantifying the relationship between ground water. The existence of general provisions in a basin which specifies those water rights which are and are not subject to conjunctive management provides necessary boundaries for making an appropriate determination in response to a delivery call.

c. Interplay between the sub-basin specific language and the general interconnection language

Within each administrative sub-basin, the third paragraph of the general provisions establishes the connectedness between the sources for water rights in the basin and other sources and water rights elsewhere in the Snake River Basin. The first

two paragraphs establish specific exceptions to this connectedness, to the extent exceptions exist within the administrative sub-basin or the overall Snake River Basin.

IV. HOW ARE THE PROPOSED GENERAL PROVISIONS TAILORED TO PROVIDE SPECIFIC EXCEPTIONS FOR EACH SUB-BASIN WITHIN THE OVERALL SNAKE RIVER BASIN?

The recommended three-paragraph conjunctive management general provisions provide opportunities for each source and each water right within the SRBA to be considered with respect to conjunctive management. On one hand, the provisions contain language common to all basins. On the other hand, the provisions can be customized to fit the needs of a specific basin.

These provisions are distinctly crafted for each administrative sub-basin within the Snake River Basin, to the extent that water rights are identified for exclusion from conjunctive management in a basin. Thus far, the three-paragraph form of the general provisions has been recommended in Basins 32, 34, 35, 36, 41, 51, 55, 57, 61, 65 (Part 1), 71 and 72. The only basins where source connectedness has been found to be limited are Basins 34 and 65 (Part 1). In these two basins, specific water rights were recommended in the first paragraph as being from sources not connected to other sources for surface water in the basins because of provisions in prior decrees. Thus far, there has been no finding of a situation where the water rights in an administrative sub-basin should be considered to be from sources that are totally disconnected from other sources in the Snake River Basin. The timing and magnitude of the effects of water withdrawals from connected sources warrant more investigation, but the existence of such connections is undisputed.

a. Basin 36

As depicted in Table No. 1, the conjunctive management general provisions for Basin 36 that were reviewed by the Idaho Supreme Court included a specific statement that the perched aquifer near Rupert, Idaho is tributary both to the Snake River upstream from Milner Dam and to the Eastern Snake River Plain Aquifer. Because this

statement did not limit conjunctive management in any respect, it was not continued in the most recent recommendation for general provisions. The most recent recommendations do not include sources or water rights that should be excluded in either the first or second paragraphs. Thus, all water rights in the basin are recommended to be decreed from connected sources of water in the Snake River Basin and are recommended to be administered conjunctively. Other differences between the two versions are in form rather than substance.

b. Basin 57

As depicted in Table No. 1, the conjunctive management general provisions for Basin 57 that were reviewed by the Idaho Supreme Court included a statement that information then available to IDWR did not provide for a complete understanding of the connectedness between water sources in Basin 57 and the Snake River. The provisions, as then proposed, would have delayed conjunctive administration of water rights within the basin relative to the Snake River until the Director determined that such administration was necessary to protect senior rights with diversions from the Snake River. The present recommendation specifies that all water rights within Basin 57 are from connected sources of water in the Snake River Basin and should be administered conjunctively. This revision is based on an assessment of more recent data that does not support the existence of a source of water that is disconnected from the Snake River. Even the deep geothermal aquifer is considered to be connected to other sources within the Snake River Basin, and IDWR believes it is appropriate, based on the guidance from the Idaho Supreme Court, to make the determination of connectedness as part of the SRBA.

c. Basin 34

In Basin 34, the differences between the most recent and previous recommendations for conjunctive management general provisions are in form rather than substance. The differences are identified as follows.

1. The previous recommendations reviewed by the Idaho Supreme Court identified streams that were recommended to be administered separately because of prior court decisions. The most recent recommendation not only identifies the streams that should be administered separately, but also enumerates the specific water rights that divert from those sources and should be administered separately.
2. The most recent recommendation clarifies that the point in time when surface water rights from the Big Lost River and its tributaries upstream from Mackay Reservoir should be administered separately from all other non-storage surface water rights from the Big Lost River downstream of Mackay Reservoir is based on specified flow rates for three consecutive days.

SUMMARY

As stated by the 1994 Interim Committee on the Snake River Basin Adjudication, providing for conjunctive management of ground and surface water rights is one of the main reasons for commencement of the Snake River Basin Adjudication. The relationship between the water rights for ground water on the Snake River Plain and the water rights of Idaho Power at Swan Falls is directly impacted by the conclusions reached in the SRBA regarding conjunctive management.

It is assumed that the SRBA District Court will determine the relative priority between surface and ground water rights. These determinations effectively anticipate a decree whereby sources are to be conjunctively managed. Explicit guidance regarding impacts on one water right caused by diversion under another water right is not necessary or warranted. Thus, it is realistic to recommend that the SRBA decrees specify that water rights from connected sources will be administered conjunctively without directing the way in which this management will occur.

The SRBA serves to bring into perspective, and into combined administration, tributaries to the Snake River including ground water, so that in the future, water distribution in tributaries will be appropriately conducted with respect to other water rights within the Snake River Basin. Adjudication of water rights with the proposed new three-paragraph conjunctive management general provisions will provide the basis for IDWR to administer ground and surface water rights conjunctively.